APPENDIX A-1

NARUC'S APRIL 15, 1991 PETITION FOR RECONSIDERATION

Pursuant to Sections 1.104 and 1.106 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. Sections 1.104 and 1.106 (1991), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully requests reconsideration of the Memorandum Opinion and Order released March 14, 1991, in the above-captioned proceeding. Fleet Call, Inc. Request for Wavier and Other Relief To Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, Docket No. LMK-90036 (released March 14, 1991) ("Fleet Call"). In support of this request, NARUC states as follows:

I. NARUC'S INTEREST

NARUC is a quasi-governmental nonprofit organization founded in 1889. Its member's include those governmental bodies of the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in the regulation of carriers and utilities.

NARUC's mission is to improve the quality and effectiveness of public utility regulation in America. Specifically, NARUC is composed of the State officials charged with the duty of regulating telecommunications common carriers within their respective borders. As such, they have the obligation to assure those telecommunications services and facilities required by the public convenience and necessity are established, and that service is furnished at rates that are just and reasonable.

NARUC supports the FCC's desire to "encourage...larger and more efficient use of radio in the public interest." Fleet Call, mimeo at 2, paragraph 11. However, NARUC is concerned that the service proposed by Fleet Call Inc.'s ("FCI") involves common carriage and therefore must be subject to regulation by the States, e.g., certifications standards, tariff requirements, non-discriminatory pricing prohibitions, complaint procedures, etc. See, 47 U.S.C. Section 331(c)(3). The Commission's Fleet Call order maintains the company's status as a private land mobile service. Thus, although States can regulate cellular common carriers, the States are preempted from regulating FCI's provision of a functionally equivalent service.

II. BACKGROUND

Specialized Mobile Radio ("SMR") was initially classified by the Commission as a private radio service. NARUC appealed this classification asserting, inter alia, that such service constituted common carriage subject to state regulation.

On appeal, the court upheld the Commission's classification. National Association Of Regulatory Utility Commissioners v. FCC ("NARUC I"), 525 F.2d 630 (1976), cert. denied, 425 U.S. 992 (1976).

In 1982, in an effort to end controversy over the standard to be applied to ascertain common carrier or private land mobile status, Congress enacted Section 332(c)(1) to provide a "...clear demarcation between private and common carrier land mobile services." House Conference Report No. 97-765, Joint Explanatory Statement of the Committee of Conference on P.L. 97-259, The Communications Amendments Act ("House Report"), 97th Cong., 2nd Sess. 54, reprinted in, 3 U.S. Code Cong. & Ad.News '82 Bd.Vol., at pages 2237, 2298 (1983). [For a short review of the events which lead up to the enactment of Section 332, see Telocator Network of America v. FCC, 761 F.2d 763 (1985).]

According to the conference report "...[t]he basic distinction...is a functional one, i.e., whether or not a particular entity is engaged functionally in the provision of telephone service or facilities of a common carrier as part of the entity's service offering. If so, the entity is deemed to be a common carrier." Moreover, private land mobile carriers cannot be "interconnected with common carrier facilities if the licensees...are engaging in the resale of telephone service..." or "...interconnected common carrier services..." House Report, at 2237, 2298.

Significantly, in that report, the conferees also note that, although the FCC maintains its exclusive radio licensing authority, "..states retain full jurisdiction to engage in the economic regulation of common carrier stations (i.e., regulation of entry, rates and practices) consistent with Sections 2(b) and 221(b) of the Communications Act of 1934 (47 U.S.C. 2(b), 221(b) (1976)) to the extent they deem it necessary in the public interest to do so." House Report at page 2300. See also, NARUC v. FCC, 880 F.2d 422, 428 (D.C.Cir. 1989); California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

Moreover, the report goes on to note that "...the Commission may not use its licensing powers to circumvent limitations in its economic regulatory jurisdiction over common carrier station. {Emphasis Added}" House Report, at page 2300. Compare, NARUC v. FCC, 533 F.2d 601, 619 (D.C.Cir 1976), where the court found that

> "the authority to experiment broadens the Commission's freedom to promulgate innovative and perhaps speculative regulations of activities over which it otherwise exercises regulatory jurisdiction. It does not, however, give the Commission power to regulate activities experimentally, where...{the Commission lacks general jurisdiction}".

It is significant that at the time of both the Court of Appeals decision and the 1982 amendment, the SMR regulatory scheme promulgated by the Commission was significantly more restrictive. Since 1982, the Commission has fundamentally changed the character of its SMR regulation. For example, end user eligibility requirements have been virtually eliminated. **Amendment of Part 90, Subparts M and S, of the Commissions's Rules**, PR Docket No. 86-404, Report and Order, 3 FCC Rcd. 1838, 1839-42, Paragraphs 15-35 (1988). The Commission has disavowed the channel recovery program. Id. at page 1845, paragraph 64. Liberal interconnection is now allowed. See, **Amendment of Parts 89, 91, 93, and 95 of the Commission's Rules to Prescribe Polices and Regulations to Govern Interconnection of Private Land Mobile Radio Systems with the Public Switched, Telephone Network**, Docket No. 20846, First Report and Order, 69 FCC 2d 1831 (1978); Second Report and Order, 89 FCC 2d 741 (1982); and Memorandum Opinion and Order, 93 FCC 2d 1111 (1983).

The result of these changes has been to erode the distinction between SMR services and certain common carrier services while maintaining inconsistent regulatory schemes.

On April 5, 1990, FCI filed a proposal to create an "enhanced" specialized mobile radio ("ESMR") systems in six congested mobile communications markets in the United States. The proposal enables FCI to combine its existing 800 MHz SMR systems in each market using digital technology to increase the capacity of its present systems and to provide a wider range of services to its customers.

On February 13, 1991, the Commission granted FCI authority to deploy this new ESMR Service in six of the nation's 10 largest metropolitan areas. The order notes that not only will FCI provide, inter alia, "traditional dispatch service" which is not "functionally different from any service that it currently provides through its existing stations," but that "[a]dditionally, Fleet Call will be able to provide... interconnected telephone-type services." Fleet Call, mimeo at 5, paragraph 29.

Irrespective of any legal analysis, the Washington Post characterizes this decision as having "...the practical effect of...expand[ing] competition in the cellular industry by allowing three - rather than the current limit of two - companies to operate in the six cites." John Burgess, "Cellular Competition Increasing" ("Burgess Article"), The Washington Post, at D6 (February 14, 1991). Although FCI eschewed any comparisons between its new ESMR service and cellular, i.e, common carrier, service in these proceedings, the Post article notes that "...Fleet Call said it expects customers will use the added capacity to tie their radio systems into the conventional phone network **in the same way that cellular systems ...do now**.

At the same time, the company would offer the service to individuals, who could make and receive calls on the move as customers of existing cellular companies can." Burgess Article at D1.

In granting this authority, the Commission concluded that the proposed changes to FCI's current SMR services did not affect FCI's status as a "private land mobile carrier" under Section 332 of the Communications Act. To the extent FCI is actually engaged in common carrier service, this determination effectively preempts state regulation of ESMR. 47 U.S.C. Section 332 (1982); Fleet Call, mimeo at page 5, paragraph 31.

Congress specifically differentiated between private carrier services and cellular service when it enacted Section 331. The Senate sponsors of the legislation pointed out that private land mobile carriers do "not include common carrier operations like the new cellular systems." See, Statement of Mr. Goldwater, for himself, Mr. Packwood, Mr. Schmitt, Mr. Pressler, Mr. Stevens, Mr. Cannon, Mr. Hollings, and Mr. Inoye upon introduction of S. 929, April 8, 1981, 127 Cong. Rec. S3702-03 (daily ed. April 8, 1981). The purpose behind the interconnection restrictions is to "assure that [private carrier] frequencies allocated essentially for purposes of providing dispatch services are not significantly used to provide common carrier message service [like cellular]." H.R. Rep. No. 76, 97th Cong., 2d. Sess. 56, reprinted in 1981 U.S.Code Cong. and Ad. News, 2261, 2300. Because the FCI proposal contemplates the provision of functionally common carrier cellular service over private carrier frequencies, the authorization of ESMR service is inconsistent with congressional intent and the express requirements of the Communications Act.

As detailed below, NARUC believes that reconsideration of the Commission's order is required for three reasons. First, the record strongly suggests that Fleet Call will offer its services in a manner similar to common carrier services that are subject to state regulatory jurisdiction. Second, the Commission failed to conduct any meaningful evaluation of the proposed ESMR service under the "functional test" for distinguishing private carriers from common carriers required under Section 332 of the Communications Act. Finally, the record shows that there are substantial public interest considerations associated with according ESMRs private carrier status that should be addressed through the rulemaking process.

III. DISCUSSION

A. THE COMMISSION HAS IMPERMISSIBLY PREEMPTED STATE REGULATION OF INTRASTATE COMMON CARRIER SERVICES.

1. The Record Suggests that ESMR Will Be Functionally Equivalent to Common Carrier Radio Services.

The Commission describes FCI's ESMR proposal as "an ambitious private land mobile radio system ["PLMRS"] that promises improved spectrum efficiency without requiring additional spectrum." Fleet Call, mimeo at 6, paragraph 36. However, this description ignores the fact that a fair reading of the FCI proposal suggests that ESMR will depart markedly from traditional SMR/PLMRS services and bear a striking similarity to common carrier cellular telephone services. See, e.g., Comments of the Cellular Telecommunications Industry Association (filed June 29, 1990) ("CTIA Comments") at pages 35-40; Reply Comments of McCaw Cellular Communications, Inc. (filed July 30, 1990) ("McCaw Reply Comments") at pages 32-33.

Historically, SMR service has been characterized by high-power, wide-area, dispatch-oriented private carriage. Because of the system of nonexclusive frequency assignments, interference protection is generally achieved through mileage separation rules. The system is highly efficient in permitting one party to communicate on a single channel with several affiliated subscribers, often through dispatch messaging from a base to multiple mobile units in a configuration known as "fleet calls." This conception of SMR is reinforced by the language of Section 153(gg) of the Communications Act. That section defines a "private land mobile service" as "a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations . . . for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation." 47 U.S.C. ' 153(gg) (1990).

Thus, PLMS is conceptually different from services designed to provide local access, like cellular and, ostensibly, ESMR, where the users do not regularly interact independently but rather interconnect with unaffiliated entities over the landline network.

ESMR will diverge from the historical SMR concept in both architecture and purpose. According to FCI's application, it will (i) be based on multiple low-power cells, exclusive frequency assignments and service area-oriented interference protection, (ii) be designed for frequency reuse, (iii) concentrate on communications between multiple mobile units in discrete "cellular-based" service areas, (iv) feature automatic call handoff among cells, and (v) expand its range of services considerably beyond dispatch to include, as Fleet Call itself has acknowledged, "mobile data communications . . . [and] substantially increased capacity to meet the unserved demand for interconnected mobile telephone service." See, e.g., Comments of Fleet Call, Inc. (filed June 7, 1990) at page 4.

In such respects, ESMR represents a radical departure from ordinary private radio SMR service. Most of the functional descriptions in the record of this proceeding strongly suggest a significant similarity between ESMR and other wireless offerings, like cellular service, which are regulated as common carriers. See, e.g., Comments of Fleet Call, Inc. (filed June 7, 1990) at pages 24-26, 37-38; Comments of Centel Corporation (filed June 29, 1990) ("Centel Comments") at pages 6-7; Comments of McCaw Cellular Communications, Inc. (filed June 29, 1990) ("McCaw Comments") at pages 31-32.

Thus, by permitting Fleet Call to continue to operate squarely within the private radio rules established for SMRs, the Commission has essentially created a new breed of common carrier service exempt from state regulation. This action removes the state discretion to ensure that such new offerings provide the best, most efficient service to the public under reasonable rates, terms and conditions. Thus, this order not only raises serious questions under the Communications Act but also overlooks the well-established interests of the states in retaining jurisdiction over such services. None of these issues, however, was fully explored in the Fleet Call waiver action.

2. The Commission did not conduct any functional evaluation of ESMR to determine its status under Section 332.

The Fleet Call decision provides only a perfunctory discussion of the status of ESMR as a private or common carrier offering under Section 332 the Communications Act. In the order, the Commission determines that the sole relevant inquiry is whether a licensee resells interconnected telephone service for profit. Fleet Call, mimeo at page 5. In fact, what is barred is resale, regardless of profit, since resale is a common carrier service. See Resale and Shared Use, 60 F.C.C.2d 261 (1976), recon. 62 F.C.C.2d 588 (1977), aff'd sub nom. American Tel. & Tel. Co. v. FCC, 572 F.2d 17 (2nd Cir. 1977), cert. denied, 439 U.S. 875 (1978) (cited in House Conference Report No. 97-765, P.L. 97-259 at 55 n.1 (Communications Amendment Act of 1982), reprinted in 1982 U.S. Code Cong. & Admin. News 2300).

In any case, discerning no FCI intention to engage in such resale, the FCC held that ESMR was a Section 332 private carrier.

The FCC's conclusion about the absence of telephone resale ignores FCI's admission, that it "will provide interconnected mobile telephone service." Fleet Call Reply Comments at page 35. The Commission itself observed that "Fleet Call will be able to provide . . . interconnected telephone-type services" as part of ESMR. Fleet Call, mimeo at page 5. Thus, even under the Commission's reading of the record, substantial evidence exists that ESMR falls outside the statutory definition of private radio.

Additionally, the FCC's narrow reading of its Section 332 obligations is erroneous. In enacting that provision, Congress did not give the Commission unfettered discretion to preempt state regulation of land mobile services through the simple expedient of labeling the service an "SMR system" and citing the absence of telephone service resale. The definition of SMR underlying Section 332 is not so elastic as to allow new services, which include the basic elements of common carrier service, to be included arbitrarily within its scope. Section 332(c)(1) is limited by its terms to "service provided by specialized mobile radio, multiple licensed radio dispatch systems, and all other radio dispatch systems." 47 U.S.C. ' 332(c)(1) (1990). Immunity granted under Section 332, as CTIA notes in its comments, must be read in pari materia as limited to private land mobile dispatch systems. CTIA Comments at 36.

Congress clearly did not intend that the section would apply to land mobile services operating functionally as common carrier, cellular-like services.

Indeed, the Senate sponsors of Section 332 flatly stated that "[PLMS] does not include common carrier operations like the new cellular systems." See Statement of Mr. Goldwater, for himself, Mr. Packwood, Mr. Schmitt, Mr. Pressler, Mr. Stevens, Mr. Cannon, Mr. Hollings, and Mr. Inouye upon introduction of S.929, 127 Cong. Rec. S3702-03 (daily ed. April 8, 1981) (emphasis added).

Furthermore, the legislative history of Section 332 plainly requires the Commission to determine the private or common carrier status of a service by examining the functional nature of that service. The Conference Report accompanying Section 332 states that "[t]he basic distinction set out in this legislation is a functional one; i.e., whether or not a particular entity is engaged functionally in the provision of telephone service or facilities of a common carrier." House Report, at page 55 (emphasis added). Even Fleet Call acknowledges that "Section 332 of the Act established a functional test for distinguishing private from common carriage." Fleet Call Reply Comments at page 35 (Emphasis Added).

The Commission was presented with considerable evidence that ESMR will be designed and function in a manner exceptionally similar to common carrier cellular service. Yet, the Fleet Call decision dismissed such arguments out of hand, concluding, inter alia, that "with respect to the regulatory status of Fleet Call's SMR service, commenters' reliance upon service offerings and system configuration is misplaced." Fleet Call, mimeo at page 5. Because of its failure to adequately address the "functional test" required by the literal language of Section 332 and its legislative history, the Commission must grant reconsideration.

B. The Commissions action ignores important competitive and service issues that must be explored in a rulemaking.

The record contains numerous examples of the manner in which FCI's existing SMR customers can be cast aside in the transition to ESMR. The Commission engaged in virtually no analysis of these potentially serious byproducts of ESMR development.

The Commission was presented with a significant list of the potential disadvantages that FCI's local customers may suffer under the conversion from SMR to ESMR:

- 0 Fleet Call may shut down its existing SMR systems temporarily for up to 11 months during the "transition" to ESMR.
- 0 Fleet Call's users may be left largely without users during these service interruptions because of the current shortage of 800 MHz service in the six target markets.
- 0 The alternative to loss of service for many users may be migration to 900 MHz services, which will require expensive equipment changes.
- 0 Existing 800 MHz SMR equipment may be obsolete once ESMR is deployed, at a cost to end users of $150 million to $250 million.
- 0 Once ESMR is ordered, Fleet Call's users will have to buy new equipment at unspecified cost.
- 0 Future dispatch needs of end users may not be met because of the system configuration and service proposals set forth by Fleet Call.

See McCaw Reply Comments at page 4; Comments of Advanced Communications Service (filed June 29, 1990) at page 2; Comments of Advanced MobileComm, Inc., (filed June 29, 1990) at page 8; Comments of American SMR Network Association, Inc. (filed June 29, 1990) at pages 2-5; Comments of Uniden Corporation of America at pages 10; Comments of Lonnie R. Danchik (June 29, 1990) at pages 3, 6-8; Comments of the National Association of Business and Educational Radio, Inc. (June 29, 1990) at 19-20; Comments of Pactel Corp. (June 29, 1990) at 6-8; Comments of Southwestern Bell Telephone Co. (June 29, 1990) at 5, 9.

The possible degradation or loss of service, the intentional migration of existing users to other services (if available) and the potentially large price increases facing end users of this new "common carrier" service -- all as described in the record -- raise vital public interest issues of potential concern to state PUCs.

Moreover, treating a FCI's "common carrier" type service like a private carrier service has at least two other significant, negative ramifications from the states' perspective:

State regulation of entry and rates is preempted. Common carriers are required to meet important criteria for the initiation of service and the setting of rates. Exempting Fleet call from these regulations means, in particular, that the company can ignore any efforts by the states to require a showing of Fleet Call's legal, technical or financial qualifications.

Private carriers are free from regulations requiring reasonable rates, provision of service upon reasonable request and non-discrimination in customer service. Private carriers need not conform to state and federal regulations designed to ensure that carriers charge just and reasonable rates, provide service upon reasonable request and do not discriminate in the provision of service to end users.

NARUC submits that the Commission's action constitutes an abuse of discretion and cannot be justified. In Fleet Call, the Commission has attempted to accomplish by private adjudication what the courts have long held to be appropriate only in a rulemaking. See Wisconsin Gas Co. v. FERC, 770 F.2d 1144, 1166 (D.C. Cir. 1985), cert. denied, 476 U.S. 1114 (1986) ("the Commission would be open to the objection that it was unfairly effectuating a general policy change without the necessary, industry-wide data and commentary"). Upon a more extensive record, the Commission may well decide that its reasoning in Fleet Call is sound. However, the full implications of the policy change, particularly as they affect the states, have not been subjected to the strong light of a formal rulemaking proceeding as required.

As various parties noted in the original proceeding, it is not sufficient that the Commission placed the Fleet Call waiver petition on public notice and solicited comment on the proposal. First, Fleet Call's situation is no different from that of any other SMR licensee. The company's desire to offer enhanced radio service is tied only to its business plan, not to any set of fact or circumstances that make Fleet Call unique and, therefore, that make a waiver proceeding the appropriate procedural vehicle for effecting the changes that the Commission has implemented. See Spanish Int'l Network, 68 F.C.C.2d 1260 (1978); see also CTIA Comments at 28-29. Second, the SMR rules themselves have been the subject of repeated notice-and-comment rulemaking proceedings since the service was created in 1974 and, thus, must be modified or reinterpreted only through a rulemaking. See American Federation of Government Employees v. FLRA, 777 F.2d 751, 759 (D.C. Cir. 1985); Arlington Telecommunications Corp., 70 FCC 2d 2291, 2298 (1979).

The Commission based its action in Fleet Call on its purported authority to grant "safety valve" relief from its rules in accordance with established doctrine for administrative waivers. The Commission also stated that the SMR rule "emphasize[] flexibility and innovation over conformity and standardization."

Fleet Call at 5-6, citing WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969). No matter how flexible the rules and innovative the service providers, however, the Commission cannot shirk its basic duty to engage in a fully public, on-the-record debate when examining such service proposals.

III. CONCLUSION

In Fleet Call, the Commission failed to conduct the functional analysis required under Section 332 of the Communications Act to determine whether ESMR, in fact, remains a private radio offering. Thus, the Commission cannot have reasonably determined that ESMR falls under Section 332 and, therefore, that state preemption applies. Accordingly, the Commission should grant this Petition for Reconsideration and subject the Fleet Call proposal to full notice and comment in a rulemaking proceeding.

APPENDIX A-2

NARUC'S MAY 10, 1991 REPLY TO OPPOSITIONS

Pursuant to Sections 1.4(h) and 1.106(h) of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. Sections 1.4(h) and 1.106(h) (1991), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits these reply comments to respond to the April 30, 1991 oppositions filed by American SMR Network Association, Inc.("ASMR"), Fleet Call, Inc.("FCI"), and National Association of Business and Educational Radio, Inc.("NABER") in the above-captioned proceeding.

I. DISCUSSION

A. As a party to this proceeding, NARUC is not required to comply with the portions of Section 1.106 applicable to nonparties.

As a preliminary matter, both NABER and FCI suggest that NARUC's petition is procedurally defective because NARUC failed to "....show good cause why it was not possible...to participate in the earlier stages of the proceeding." 47 C.F.R. Section 1.106(b)(1) (1991). NABER Opposition at 1-2. FCI Opposition at 5-10. However, this requirement is limited to "...a person who is not a party to the proceeding." NARUC did not make such a showing because NARUC is a party to this proceeding and did participate below. Indeed, NARUC's participation was at least partially responsible for the FCC's June 8, 1990 order extending the time for action.

As the quoted passage from Section 1.106 demonstrates, the Commission's regulations do distinguish "parties" from nonparties. However, aside from the rules concerning hearing procedures, Section 1.201 et seq., which are not applicable here,[3] the FCC's regulations do not specifically address acquisition of party status.

Those that do designate particular entities as parties indicate that NARUC achieved that status by filing a May 1990 pleading in this proceeding.

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[3] Interestingly, there, as in the Federal Rules of Civil Procedure, one must merely file a pleading, i.e., intervention, that adequately "...show[s] the basis of its interest" to acquire "party" status. Further pleadings are not required, nor is a party required to participate in the subsequent hearing to retain "party" status. Cf. Sections 1.223(a) & 1.221 (1991); Fed. R. Civ. P. Rule 24; and NARUC's May, 1990 pleading at 1, "NARUC'S INTEREST".

That motion supported another party's filing and asked the FCC to extend the deadlines for filing comments. Section 1.46, which discusses such extension requests, indicates that, under certain circumstances "...the **party** [e.g., NARUC] filing the motion shall (in addition to serving the motion on **other parties**) orally notify **other parties.**" [Emphasis Added]

Accordingly, all five of the cases cited by both parties are not on point because, not only are they each independently distinguishable on other factual and procedural points,[4] but also because none involve concern reconsideration requests by a party to the proceeding under Section 1.106. Indeed, the holding of one case cited by FCI to demonstrate NARUC's purported lack of standing actually requires NARUC to exhaust all available administrative remedies and petition for reconsideration. In Red River Broadcasting Company v. FCC, 98 F.2d 282, (D.C. Cir), cert. denied, 305 U.S. 625 (1938), cited in FCI's Opposition at 7, the court dismissed an appeal specifically because the appellant, which, unlike NARUC, had not filed any pleadings or otherwise participated in the proceedings before the agency, failed to petition the FCC for rehearing of the decision below before appealing to the court.

B. Should the FCC determine that NARUC is not a "party" for purposes of Section 1.106, NARUC respectfully requests any waivers required to amend its petition for reconsideration.

NARUC, based upon its good faith belief that it is a party, did not attempt to comply with the Section 1.106 requirements applicable to non-parties. However, should the FCC determine that such compliance is necessary, NARUC respectfully requests any waivers necessary to amend its petition for reconsideration. No party will be prejudiced by granting this request because all have had notice of and an opportunity to address NARUC's arguments on the merits.

Granting this waiver would also serve the public interest because it would lend certainty to this area of FCC regulation.

During the press conference that followed adoption of the FCI order, Bureau Chief Haller indicated that the FCC would grant similar treatment to any other SMR carrier applicants.

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[4] For example, on pages 5-6 of its comments, FCI cites as support for dismissal of NARUC's petition for failure to comply with Section 1.106, Spanish International Broadcasting Co. v. FCC, 385 F.2d 615 (D.C.CIr 1967), a case involving an intervention filed after the time limits set by the FCC's rules had expired. NARUC's petition was timely and, as indicated above, because it is party, no additional explanations are required by the FCC's rules.

Dismissal of NARUC's petition on procedural grounds, if not overturned on appeal, would merely postpone to a later proceeding the ultimate resolution of the proper application of the Section 332 functional test. NARUC's proposed amendments, which will be filed separately in appropriate form if (i) the FCC determines NARUC is not a party and (ii) grants the waiver, are attached as Appendix A.

C. The FCC failed to conduct an adequate functional evaluation of ESMR to determine its status under Section 332 and erred in granting FCI's waiver request.

The remainder of the arguments presented in opposition to NARUC's petition can be basically divided into three contentions: (i) the waiver was appropriately granted, (ii) NARUC is arguing for rejection of long-standing principles, and (iii) NARUC raises no new arguments on reconsideration.

While it is true that NARUC drew some arguments from the comments filed below, the crux of NARUC's complaint, as discussed in more detail below, is the Commission's failure in the FCI order to conduct an adequate functional evaluation of ESMR service and the fact that there may not be substantial evidence in the record to support the Commission's actions. For example, both the FCC and FCI agree that FCI's entire ESMR proposal is "...driven by the need to offer its end users more capacity." FCI Opposition at 21. However, aside from the 800 Mhz channels involved in its ESMR request, FCI is also the licensee of 900 Mhz channels in two of the ESMR markets - Los Angeles and Dallas. Despite the alleged capacity shortage, FCI does not appear to be able to utilize the channels it already has. In August of 1990, it filed with the Commission applications to assign the licenses of two, ten channel 900 Mhz frequency systems in Los Angeles (FCC File Nos. 9008511557 and 9008511558). The assignee of the channels is the Southern California Edison Company, which is expected to utilize the frequencies for its own needs and not make them available to other SMR users. Such an action can not be reconciled with the capacity shortage cited by FCI and the FCC as the basis for the waiver request.

Similarly, recent FCI comments in another FCC proceeding (PR Docket 90-481) suggest that the company has an established policy of constructing SMR facilities but not utilizing them.

Its January 8, 1991 comments contend that a timely constructed system includes

> "a fully functional transmitter capable of serving end users by the end of construction period, but that an end user need not be licensed and operating on the system." (emphasis in the original) FCI Comments at 3-4.

The comments also suggest that the FCC should not apply any changes to this rule retroactively to existing licensees. This request for "grandfathered" treatment suggests that FCI currently is the operator of fully functional, but unused SMR systems, perhaps in those ESMR markets which make up a significant percentage of FCI's holdings. Thus FCI's policy and the probability of at least some unused facilities in the target markets also undermines the basis for the waiver.

Even if one assumes that the targeted markets are congested, one is left with the interesting FCC conclusion that no "wholesale disruption" is likely, in part because, FCI will help customers who do not want its new, and potentially more expensive, ESMR service to migrate to other competing SMR systems in the market, systems that, presumably, are just as congested as FCI's. 6 FCC Rcd at 1537, paragraphs 34 and 35.

Opponents also suggest NARUC is inappropriately challenging established law. Although, as discussed elsewhere, the focus of NARUC's complaint is the FCC's application of the Section 332 "functional test" - where an appropriate analysis of that statutory standard brings into question the substantive validity of some agency rule or policy, e.g., the so-called M and S Order, 3 FCC Rcd 1838 (1988), aff'd, 4 FCC Rcd 356 (1989), particularly one never subjected to judicial review, that agency, of course, has the right to re-examine its policy. Moreover, the courts, to the extent that the FCC's analysis renders "...the rule or policy subject to renewed challenge on any substantive grounds" will not dismiss a coordinate challenge to the rule or policy "because of a limited statutory review period." See, Public Citizen v. NRC, U.S.App.D.C. Case No. 89-1017, Slip Opinion at 9-10 (April 17, 1991), and the cases cited therein. Accordingly, to the extent NARUC's arguments do call into question the substantive validity of established regulations, reexamination of those regulations is entirely appropriate.

In the end analysis, however, NARUC's concern centers on the appropriate application of the statutory test, i.e., whether FCI is "engaged functionally in the provision of telephone service or the activities of a common carrier."

As the legislative history makes clear, an appropriate functional analysis of a proposed SMR service "...will assure that frequencies allocated essentially for purposes of providing dispatch service are not significantly used to provide common carrier message service." House Conference Report No. 97-765, 97th Cong., 2nd Sess. 54, reprinted in, 3 U.S. Code Cong. & Ad.News '82 Bd.Vol., at 2300 (1983).

Under the proposed ESMR service, it appears that a substantial number of the users will be seeking mobile access to the telephone

system and not seeking (or paying for) traditional "dispatch-type" private land mobile services. In such a situation, a user cannot switch to an alternate SMR, since it is not seeking private land mobile service to begin with. Accordingly, an SMR can markup airtime for access to interconnection, thereby essentially engaging in common carrier "resale" of telephone service, although no direct markup of telephone charges is present.

In this proceeding, FCI states that "ESMR will provide interconnected mobile telephone service." FCI Reply at 35. In other forums, "Fleet Call sa[ys] it expects customers will use the added capacity to tie their radio systems into the conventional phone network **in the same way that cellular systems ...do now**. At the same time, the company would **offer the service to individuals**, who could make and receive calls on the move **as customers of existing cellular companies can**." John Burgess, "Cellular Competition Increasing", The Washington Post, at D1 and D6 (February 14, 1991). See Appendix B. Fleet Call also believes the grant of the waiver "gives it an opportunity to shake up the cellular industry's comfortable duopoly" Mary Lu Carnevale, "Fleet Call Inc. Is Cleared to Build Digital Communications Systems", The Wall Street Journal, (February 14, 1991). See Appendix B for the rest of the article which, inter alia, quotes FCI's Chairman as saying FCI will be "a much more viable competitor to cellular." Indeed, in FCI's own February 13, 1991 new release, it describes a new service it will provide in addition to "individualized or customized voice dispatch, non-voice dispatch, mobile data communications, vehicle location, fax and emergency location" as follows: "ESMR also will provide mobile phone service with quality similar to cellular and wire-based telephone systems." See Appendix B. And, the Commission notes "Fleet Call will be able to provide . . . interconnected telephone-type services." Waiver Order at 5. Contrary to the opponents contentions concerning the relevancy of newspaper articles which quote and paraphrase FCI spokesmen (persons presumably familiar with both the technical and legal aspects of both the proposed ESMR service and the more traditional SMR service), the resemblance of ESMR to cellular telephony, and FCI's perception (as revealed in its public announcements), and thus its potential customers perception, of the service to be offered is relevant to any functional analysis. Moreover, FCI's public descriptions of one of its new services clearly suggest that spectrum allocated for dispatch service is being significantly used to provide common carrier message service."

In addition, when making a functional analysis, one should carefully examine all related language in the Communications Act. Section 153(gg) defines a "private land mobile service" as "a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations . . . for private one-way or two-way land mobile radio

communications by eligible users over designated areas of operation." 47 U.S.C.A. Section 153(gg). This is conceptually different from services designed to provide local access, like cellular and ESMR, where the users do not generally communicate among themselves, but rather with others over the landline network.

This distinction is further supported by the express language of Section 332(c)(1), which is limited by its terms to "service provided by specialized mobile radio, multiple licensed radio dispatch systems, and all other radio dispatch systems." 47 U.S.C. ' 332(c)(1) (1990) (emphasis added). Immunity granted under Section 332, as CTIA notes, must be read in pari materia as limited to private land mobile dispatch systems. Comments of CTIA at 36.

Other relevant factors in this analysis should include whether FCI is advertising to the general population and what percentage of FCI's ESMR airtime will be consumed in local access as opposed to dispatch. If, in fact, FCI is attempting to duplicate services provided by -- and compete with -- regulated common carriers on private radio spectrum, state public utility commissions have a significant interest in ensuring the availability of nondiscriminatory rates, continued availability of service, the qualifications of FCI as a carrier, and a host of other concerns.

In any event, even if FCI's dispatch services fall under Section 332's immunity provision, that part of its ESMR service constituting common carrier mobile telephone service should not.

Finally, even if one assumes, arguendo, that NARUC has raised no new arguments, the Red River case mentioned earlier would seem to require NARUC to exhaust all its remedies before the agency before taking the question to the courts of appeal.

May 10, 1991 REPLY - APPENDIX A - PROPOSED SECTION 1.106 AMENDMENT IF THE FCC DETERMINES NARUC IS NOT A PARTY TO THIS PROCEEDING.

Section 1.106(b)(1) of the Commission's regulations states that if a petition for reconsideration is filed by "a person who is not a party to the proceeding, it shall state with particularity the manner in which the persons interests are adversely affected by the action taken, and shall show good cause why it was not possible...to participate in the earlier stages of the proceeding." 47 C.F.R. Section 1.106(b)(1) (1991). NARUC's original pleading amply demonstrates the unique and significant adverse impact on state jurisdiction of the Section 332 functional analysis contained in the Fleet Call Order. However, the reasons NARUC determined not to file comments require further explanation. NARUC has a relatively small Washington staff with limited resources. At NARUC, the Deputy Assistant General Counsel has primary responsibility for monitoring all FCC matters, researching and

reporting to the membership on proceedings of interest, and drafting the related pleadings. Typically, NARUC does not file in any FCC proceeding without a resolution properly passed by the membership. These resolutions are passed at conventions held three times a year - in February, July, and November. Because of the difficulties associated with getting a consensus and the timing of the conventions, these resolutions are frequently passed after the period for filing comments in a particular proceeding has lapsed. Accordingly, NARUC often seeks permission to file late comments.

Initial comments were not filed in this docket because of several different factors:

1. Within a month of drafting NARUC's May 1990 extension request, the Deputy Assistant General Counsel left NARUC to take a job with the FCC. Thus he was not present at the July meeting to orally present his reports to either the Staff Communications Committee or the Communications Committee proper.
2. As pointed out in NARUC's May extension request, NARUC does not regularly participate in private radio proceedings and many, if not all, of its members are unfamiliar with the regulations involved in and the issues presented by this proceeding.
3. Also as pointed out in the May request, the FCI proposal raises many complex legal issues, and proposes several changes in the current FCC rules.
4. In the absence of any discussion of the case by the Deputy and because of the general information gap concerning the application among the membership, it appears there was little, if any, discussion of FCI's application at the July meeting.
5. The current Deputy assumed NARUC's FCC caseload, and the two plus month backlog of pleadings - both to read and to file - in September, 1990. The Deputy did skim the FCI file, but in the absence of a resolution, only noted it for discussion at NARUC's next meeting in November, 1990.
6. At the November meeting, NARUC passed a resolution concerning the FCC's PCN Notice of Inquiry in Gen Docket No. 90-314. The Deputy also asked for technical and/or legal input on the FCI proposal from various state commission experts. Because the state commissions rarely participate in this area of FCC regulation, few could offer viable assistance.
7. While researching the PCN comments, questions concerning FCI's application resurfaced. Discussions with various State Commission staffers indicated that NARUC's November 1990 resolution on PCN's was sufficient authority to file in the FCI proceeding IF an analysis of the proceeding indicated the probability of state preemption. The Deputy was initiating gaining consensus to file draft comments when the FCI order was put on agenda.

May 10, 1991 REPLY - APPENDIX B - MATERIALS

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Cellular Competition Increasing

New Phone Service Gets FCC Approval

By John Burgess
Washington Post Staff Writer

Federal regulators yesterday opened the way for new competition in cellular telephone service, giving tentative approval to a small New Jersey firm to set up rival systems in six U.S. cities.

The Federal Communications Commission said Fleet Call Inc. could install new digital technology that could expand by fifteenfold the capacity of two-way radio systems that it already operates for drivers and dispatchers of commercial trucking and delivery companies.

Fleet Call said it expects customers will use the added capacity to tie their radio systems into the conventional phone network in the same way that cellular systems operated by local phone companies and others do now. At the same time, the company would offer the service to individuals, who could make and receive calls on the move as customers of existing cellular companies can.

Some analysts believe the system might have disadvantages over today's cellular systems, however, such as the inability to make calls from neighboring service areas.

See FCC, D6, Col. 1

D1 WashPost Feb 14 1991

Cellular Phone Competition To Increase

FCC, From D1

While there are some differences in the systems, the practical effect of yesterday's FCC decision is to expand competition in the cellular industry by allowing three—rather than the current limit of two—companies to operate in the six cities. The FCC said it would be willing to consider granting licenses in other cities in the future.

Pricing for the new cellular service has not been set. "We'll have to keep an eye on cellular prices, whatever they are in the next two years," said Morgan O'Brien, Fleet Call's chairman.

The move was fought by the cellular telephone industry, which since its inception in the early 1980s has operated under rules allowing only two companies to be licensed in each market. The 1990s are seeing new demands for radio services that range from satellite television broadcasts to wireless data networks. The FCC is trying to figure out ways to accommodate these demands to a broadcast spectrum, which by its physical nature is limited.

"We must encourage more spectrum-efficient technologies if we are to satisfy the demand for mobile communications in this country," said FCC official Michael Lewis.

The FCC already has licensed, on an experimental basis, systems that would use other frequencies to operate lightweight pocket telephones. Fleet Call's authorization, which still must obtain further FCC approval, is for a full commercial system in the six cities, on permanent frequencies.

Privately held Fleet Call had sales last year of $65 million. To build the six systems, which it estimates would cost about $700 million, it will need to line up a major corporate partner to help with financing. O'Brien said the company hopes to begin operating the new service in Los Angeles in two years. It also has the go-head to build systems in Chicago, New York, Houston, Dallas and San Francisco, a job it hopes to complete by the end of 1995.

MARKETPLACE

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THURSDAY, FEBRUARY 14, 1991

Fleet Call Inc. Is Cleared to Build Digital Communications Systems

By Mary Lu Carnevale
Staff Reporter of The Wall Street Journal

WASHINGTON—The Federal Communications Commission gave Fleet Call Inc., a radio dispatch company, authority to build digital mobile communications systems in six large metropolitan areas.

Fleet Call believes the move gives it an opportunity to shake up the cellular industry's comfortable duopoly. The commission's action allows the privately held company to establish wide-area digital systems in Chicago, Dallas, Houston, Los Angeles, New York and San Francisco, where Fleet Call currently operates analog dispatch, mobile telephone and other two-way radio services. Fleet Call's executives say that once their systems are installed, they will be better able to compete against the two cellular carriers that the FCC has licensed in each market.

The Cellular Telecommunications Industry Association said it was disappointed by the decision but that it didn't believe specialized mobile radio operators "will ever be able to match the high level of service and capabilities offered by cellular." The association said it opposed Fleet Call "because we saw it trying to change the very nature of the private radio service without benefit of public debate." The group also argued that services that mimic cellular should be regulated similarly.

The FCC, however, said its decision doesn't put Fleet Call on the same footing as cellular telephone companies. "Fleet Call simply does not have the flexibility of cellular carriers," said Ralph Haller, who heads the FCC's private radio bureau. Not only does it lack the large number of frequencies assigned to cellular, but it also shares some frequencies with other radio services.

In addition, the specialized mobile radio service under which Fleet Call operates doesn't allow customers to use their car phones outside of the service territory. Cellular companies have worked out so-called roamer agreements that allow customers to use their telephones when they are out of their regular service territory.

The restrictions haven't damped the enthusiasm of Fleet Call's executives. "We're going to be a much more viable competitor to cellular once we have the capacity and the technology in place," said Fleet Call Chairman Morgan E. O'Brien, a communications lawyer at Jones Day Reavis & Pogue's Washington office.

Mr. O'Brien said the company first plans to update equipment in its Los Angeles market, a project that involves replacing single large transmitters with many small base stations. The project is expected to be completed in 1993.

Fleet Call, based in Bloomfield, N.J., has yet to choose an equipment supplier but is likely to use the new "time division multiple access" technology, which could provide at least 15 times the capacity of the current analog system, Mr. O'Brien said. A large part of the company's future business, he indicated, will be data transmissions, including computerized dispatch services and document transmission for sales, real estate and the construction industry.

Fleet Call was started in 1987 by Mr. O'Brien, who is a former FCC lawyer, and Brian McAuley, who had been with Millicom Inc., a paging and cellular company. They began buying up licenses in the specialized mobile radio band in the six cities; the company now serves 150,000 mobile units. Last year, Fleet Call asked the FCC for permission to upgrade and expand its service, but it met strong opposition from the cellular industry.

Fleet Call isn't the only radio service that is switching to digital technology. Last year, New York-based Ram Mobile Data began setting up a nationwide digital data network using mobile radio frequencies, and other local systems are planned.

FLEET CALL

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NEWS RELEASE

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FCC PAVES WAY FOR NEW WIRELESS COMMUNICATIONS NETWORK IN SIX OF THE LARGEST U.S. MARKETS

BLOOMFIELD, N.J., Feb. 13 -- The Federal Communications Commission (FCC) today voted to permit Fleet Call Inc. to put in place an innovative wireless communications network in six of the largest U.S. markets. Those markets -- Los Angeles, San Francisco, New York, Chicago, Dallas and Houston -- have a total population of more than 60 million.

"Quite simply, the FCC action permits us to provide better, higher quality wireless communications services," said Fleet Call chairman Morgan E. O'Brien. "The action has cleared the way for Fleet Call to play an increasingly important role in perhaps the most dynamic sector of the telecommunications industry."

"Our system will have important benefits for existing customers," added Brian D. McAuley, president and chief executive of Fleet Call. "Among these are better signal quality, virtually no busy signals, larger service areas and new service options."

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The decision permits Fleet Call, the nation's second largest Specialized Mobile Radio (SMR) operator, to provide Enhanced Specialized Mobile Radio (ESMR) service, which features vastly improved quality and capacity compared to traditional SMR. The company has 150,000 customers in its six markets.

SMR services include dispatch, mobile phone and other two-way radio services used primarily by fleets of vehicles. Fleet Call, through digital transmission and other new technologies, will improve the quality and enhance the scope of those services and increase by at least 15 times the capacity of its existing analog SMR networks.

Fleet Call's SMR networks currently operate at or near capacity. Under its ESMR proposal, however, Fleet Call will be able to achieve significant capacity increases within the context of its existing spectrum allocation. No new spectrum will be required.

Market Growth

"Wireless communications -- which in addition to SMR includes cellular telephone and paging services -- is expanding at a rapid pace," Mr. O'Brien commented.

-more-

The market for SMR service, he noted, has grown from 5000 units in 1979 to approximately 1.1 million units by the end of 1990, an annual growth rate of about 65 percent.

Perhaps a better indicator of ESMR's market potential, Mr. O'Brien said, is the expected growth of wireless communications service. Almost 1.5 percent of people use cellular service in areas where it is offered. Analysts predict penetration rates will increase to 8 percent by 1995 and exceed 15 percent by the year 2000. Similarly, the number of pagers in use grew from one million in 1980 to 9.3 million in 1990 and is expected to grow to 20 million by 2000.

"ESMR should benefit from this increased acceptance of wireless communications services. With ESMR, we expect to be a very aggressive competitor in the wireless communications market," Mr. O'Brien said.

Fleet Call's ESMR proposal is built around a digital frequency re-use plan. The local service areas will be divided into sites, each using a low-power radio transmitter, permitting re-use of a given channel at non-adjacent sites. The proposal also calls for multiplexing techniques that permit different users to share the same channel simultaneously.

Together, these changes should result in at least a 15-fold increase in system capacity, enabling Fleet Call to expand its services and customer base without requiring additional spectrum. Without these changes, Fleet Call would be unable to serve additional customers on its existing congested frequencies.

New Equipment, Services

In the transition to ESMR, bulky analog sets will be replaced with streamlined subscriber units. ESMR, by design, will allow widespread use of portable equipment.

The new services will include individualized or customized voice dispatch, non-voice dispatch, mobile data communications, vehicle location, fax and emergency location. ESMR also will provide mobile phone service with quality similar to cellular and wire-based telephone networks.

"In addition, we will offer our fleet dispatch customers ESMR's improved quality and a larger service area for virtually the same price as traditional SMR service," Mr. McAuley said.

Mr. McAuley added that he expects most of Fleet Call's SMR subscribers to convert to ESMR as it becomes available. Traditional SMR capacity will be available, however, for those who do not wish to move to ESMR's improved technology.

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Regional, Not Local, Coverage

Fleet Call's ESMR plan also will result in extensive coverage areas. The metropolitan New York area, for example, will encompass not only New York City but also much of Connecticut, including New Haven and Stamford, areas of New Jersey, extending to parts of Ocean County, and virtually all of Long Island.

Mr. McAuley said Fleet Call will introduce ESMR services market by market, with Los Angeles completed in 1993. All systems should be up and running by the end of 1995.

Mr. McAuley estimated that Fleet Call will invest between $700 million and $1 billion to implement ESMR. He added that the company expects to fund these costs through vendor financing and other arrangements.

Fleet Call was formed in April 1987 for the purpose of acquiring SMR systems operating at or near full capacity and combining them to achieve management efficiencies and increased capacity through the use of technology. The company last year posted revenues of approximately $65 million.

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